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CASE REVIEWS

Recent Cases

These case reviews are not intended to substitute for the headnotes or ratios of the cases. You are strongly encouraged to read the full decisions. Some decisions are linked to AustLii, where available.

Decisions reported in this issue:

1. Comcare v Banerji [2019] HCA 23
2. Brideson by guardian Lynette Brideson and Australian Capital Territory (Compensation) [2019] AATA 2314
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High court of Australia Decisions

The Court held that ss 10(1), 13(11) and 15(1) of the Public Service Act 1999 (Cth) does not impose an unjustified burden on the implied freedom of political communication and that the termination of the worker's employment with the Commonwealth was not unlawful

Comcare v Banerji [2019] HCA 23 – Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ – 7 August 2019

Summary

The High Court heard Comcare's appeal against a decision of the AAT (after the intervention of the Attorney-General of the Commonwealth), which held that ss 10(1), 13(11) and 15(1) of the *Public Service Act 1999 (Cth)* (*"PSA"*) as at 15 October 2012 ("the impugned provisions") imposed an unjustified burden on the implied freedom of political communication, with the result that the termination of the respondent's employment with the Commonwealth for breaching the Australian Public Service ("*APS*") Code of Conduct was not reasonable administrative action taken in a reasonable manner with respect to her employment within the exclusion in s 5A(1) of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) ("*the SRC Act*").

The Court allowed the appeal and held that the impugned provisions did not impose an unjustified burden on the implied freedom of political communication, and the termination

of the respondent's employment with the Commonwealth was not unlawful. Their Honours Kiefel CJ, Bell, Keane and Nettle JJ delivered a joint judgment. Their Honours Gageler, Gordon and Edelman JJ agreed with the majority's orders, but gave their own reasons.

Background

In May 2006, the worker commenced work as an Australian Public Servant ("*APS*") within the Ombudsman and Human Rights and Equal Opportunity Section of what became the Department of Immigration and Citizenship ("the Department"). Before 7 March 2012, she began broadcasting tweets on matters relevant to the Department, using the Twitter handle "@LaLegale" and made more than 9,000 such tweets, at least one of which was broadcast during her working hours, and many of which were variously critical of the Department, other employees of the Department, departmental policies and administration, Government and Opposition immigration policies, and Government and Opposition members of Parliament. The AAT found that *"some of the tweets are reasonably characterised as intemperate, even vituperative, in mounting personal attacks on government and opposition figures."*

On 7 March 2012, the Workplace Relations and Conduct Section of the Department ("the WRCS") received a complaint that the worker was inappropriately using social media in contravention of the *APS* Code of Conduct. Following a review of that complaint, the Director, WRCS decided that it did not contain sufficient material to proceed with a formal investigation and advised the complainant of his determination.

However, on 9 May 2012, the WRCS received a more-detailed complaint about the worker's conduct and on/around 15 May 2012, the Director decided to initiate an investigation and the worker was informed of that decision. The investigation was conducted between 15 May 2012 and 13 September 2012 and the Assistant Director, WRCS prepared an investigation report dated 13 September 2012. On 20 September 2012, an authorised delegate of the Secretary of the Department advised the worker in writing of a proposed determination that she breached the *APS* Code of Conduct and invited her to respond. That day, the worker sent an email response to the WRCS.

On 15 October 2012, the delegate determined that the worker had breached the *APS* Code of Conduct and proposed a sanction of termination of employment. The worker was provided with the determination and given seven days to respond. On 19 October 2012, the Director, WRCS and the delegate met the worker and her union representative at the worker's request. During that meeting, the worker admitted to having broadcast tweets under the handle @LaLegale in which she criticised Government immigration policy and her direct departmental supervisor. She also sent an email to the complainant that day offering an "unreserved" apology. She sought and was granted a number of extensions of time to respond to the proposed determination of sanction (the last expired on 2 November 2012).

On 1 November 2012, the worker sought interim and final injunctions in the Federal Magistrates Court of Australia (now the Federal Circuit Court of Australia) to restrain the Department from proceeding with the proposed sanction of termination of her employment.

On 2 November 2012 and 11 November 2012, the worker submitted responses to the proposed sanction of termination of employment and her union representative also sent responses on 2 November 2012 and 9 November 2012. On 17 November 2012, the worker sent an email to the Director, WRCS in which she withdrew her admission and apology and alleged that the process underlying the investigation and termination decision was flawed.

On 9 August 2013, the Federal Circuit Court refused to grant an interim injunction. On 15 August 2013, the Director, WRCS advised the worker in writing of the steps that the Department proposed to finalise the process relating the breaches of the Code of Conduct. It advised her that the delegate would consider all of the information provided by and on her behalf in response to the 15 October 2012 determination and would then advise her in writing of the proposed sanction (if any) and invite her to make any further submissions. The delegate would then complete the review process and make a final determination as to the sanction to be imposed, but this would not be implemented until 14 days after the determination was made.

On 26 August 2013, the delegate gave the worker a further opportunity to respond to the proposed sanction of termination of employment and on 30 August 2013, she made a further response.

On 12 September 2013, the delegate advised the worker in writing of their decision to impose a sanction of termination of employment under s 15 of the *Public Service Act*. On 13 September 2013, the Director, WRCS (who at that time was acting as the Assistant Secretary, People Services and Systems Branch, and held a delegation under s 78(7) of the *Public Service Act* to exercise the power to make decisions under s 29(1)) issued a notice of termination of employment effective from close of business on 27 September 2013.

On 18 October 2013, the worker lodged a claim for compensation under s 14 of the SRC Act for an "injury" within the meaning of s 5A(1) of the SRC Act, which allegedly comprised an "adjustment disorder characterised by depression and anxiety" being an aggravation of an underlying psychological condition arising out of termination of her employment.

On 24 February 2014, Comcare rejected the claim.

On 28 March 2014, the worker entered into a Deed of Agreement with the Commonwealth of Australia represented by the Department to settle the proceedings in the Federal Circuit Court.

On 1 August 2014, another delegate of the appellant affirmed the decision to reject the compensation claim on the basis that the termination of the worker's employment was reasonable administrative action taken in a reasonable manner in respect of the worker's employment, within the meaning of s 5A(1) of *the SRC Act*, and, consequently, that such injury as the worker may have suffered (if any) was not an "injury" within the meaning of that section.

Relevant statutory provisions

Section 14 of *the SRC Act* provides, relevantly, the appellant is liable to pay compensation in accordance with that Act in respect of an "injury" suffered by an employee if the injury results in death, incapacity for work, or impairment.

Section 5A(1) of the *SRC Act* defines "injury" as including, in substance, an aggravation of a mental injury that arose out of, or in the course of, employment, but as excluding any such aggravation as is suffered as a result of reasonable administrative action taken in a reasonable manner in respect of an employee's employment.

Section 10 of the PSA defines the *APS* Values, relevantly as follows:

(1) The *APS* Values are as follows:

(a) the *APS* is apolitical, performing its functions in an impartial and professional manner;…

(g) the *APS* delivers services fairly, effectively, impartially and courteously to the Australian public and is sensitive to the diversity of the Australian public.

Section 13 of the *PSA* sets out the *APS* Code of Conduct, relevantly, as follows:

(1) An *APS* employee must behave honestly and with integrity in the course of *APS* employment.

(7) An *APS* employee must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with *APS* employment. ...

(11) An *APS* employee must at all times behave in a way that upholds the *APS* Values and the integrity and good reputation of the *APS*.

Section 15 of the *PSA* provides for the establishment of procedures for the determination of breach, in sub-s (3), and prescribed the sanctions available, subject to any limitations in the regulations, as follows:

(1) An Agency Head may impose the following sanctions on an *APS* employee in the Agency who is found (under procedures established under subsection (3)) to have breached the Code of Conduct: (a) termination of employment; (b) reduction in classification; (c) re-assignment of duties; (d) reduction in salary; (e) deductions from salary, by way of fine; (f) a reprimand.

Both the Public Service Commissioner and the Department promulgated guidelines to assist employees in complying with their obligations under the *PSA.* At relevant times, the guidelines explained that *"[p]ublic comment, in its broadest sense, includes comment made on political or social issues at public speaking engagements, during radio or television interviews, [and] on the internet",* and cautioned that it was not appropriate for a Department employee to make unofficial public comment that is, or is perceived as, compromising the employee's ability to fulfil his or her duties professionally in an unbiased manner (particularly where comment is made about Department policy and programmes); so harsh or extreme in its criticism of the Government, a member of Parliament or other political party and their respective policies that it calls into question the employee's ability to work professionally, efficiently or impartially; so strongly critical of departmental administration that it could disrupt the workplace; or unreasonably or harshly critical of departmental stakeholders, their clients or staff.

More extensive guidance was provided *APS* Commission Circular 2012/1 (*the APS Guidelines*), which recorded that, *"[a]s a rule of thumb, irrespective of the forum, anyone who posts material online should make an assumption that at some point their identity and the nature of their employment will be revealed"*. Their tenor was repeated for employees of the Department in a document entitled *'"What is Public Comment?' Workplace Relations and Conduct Section Fact Sheet".*

Kiefel CJ, Bell, Keane and Nettle JJ noted that in the AAT, the parties agreed that the only issue for determination was whether or not the termination of the worker's employment with the Commonwealth falls outside the exclusion in s5A(1) of *the SRC Act*, having regard to the implied freedom of political communication.

Their Honours stated that it was unfortunate that the issue was framed in those terms as it appeared to have led the AAT to approach the matter wrongly, as if the implied freedom of political communication was a personal right like the freedom of expression guaranteed by ss 1 and 2(b) of the *Canadian Charter of Rights and Freedoms* or the freedom of speech guaranteed by the First Amendment to the *Constitution of the United States.* Therefore, the AAT spoke in terms of the impugned provisions imposing a *"serious impingement on Ms Banerji's implied freedom"* and stated that *"the burden of the code on Ms Banerji's freedom was indeed heavy".* It reasoned that Canadian jurisprudence regarding the balance to be struck between an individual government employee's *"duty of fidelity and loyalty"* and the *"countervailing rights of public servants to take part in democratic society"* was *"illuminative and the appropriate balance to be struck between the implied freedom and the fostering of an apolitical [Australian] public service".* Ultimately, it decided the matter wrongly on the basis that *"the use of the Code as the basis of termination of Ms Banerji's employment impermissibly trespassed upon her implied freedom of political communication."*

The Court has emphasised repeatedly (most recently before the AAT's decision in this matter in *Brown v Tasmania)*, that the implied freedom of political communication is not a personal right of free speech, but a restriction on legislative power that arises as a necessary implication from ss 7, 24, 64 and 128 and related sections of the *Constitution.* Therefore, it extends only so far as is necessary to preserve and protect the system of representative and responsible government mandated by the *Constitution*.

Therefore, while the effect of a law on an individual's or a group's ability to participate in political communication is relevant to the assessment of the law's effect on the implied freedom, the question of whether the law imposes an unjustified burden on the implied freedom of political communication is a question of the law's effect on political communication as a whole.

Even if a law significantly restricts the ability of an individual or a group of persons to engage in political communication, it will not infringe the implied freedom of political communication unless it has a material unjustified effect on political communication as a whole. Therefore, the way in which the AAT decided the matter was misconceived.

In this appeal, the worker argued that on a proper construction, the impugned provisions did not apply to *"anonymous"* communications (being *"communications whose immediate context evinces no connection to the speaker's status as an APS employee (eg by giving her or his name, or position as a public servant)"*) and because her tweets did not on their face disclose her true name or the fact of her being an employee of the *APS*, they were *"anonymous"* communications and the impugned provisions did not apply to them.

The worker also made two alternative arguments, namely:

(1) So far as the impugned provisions purported to authorise sanctions against an *APS* employee for *"anonymous"* communications, they were invalid because they imposed an unjustified burden on the implied freedom of political communication; and

(2) If the impugned provisions did not of themselves impose an unjustified burden on the implied freedom, the decision to terminate her employment based on her *"anonymous"* communications, was vitiated by the decision maker's failure explicitly to take into account the effect of the implied freedom.

Their Honours decided to entertain the worker's arguments because they differed fundamentally to those put before the AAT and that if the worker had put them before the AAT *"it is not improbable that the appellant would have called evidence illustrative of the*

damage to reputation and integrity of the APS likely to have been caused by so-called anonymous tweets of the kind broadcast by the respondent."

Their Honours stated, as detailed in the guidelines to *APS* employees, as a rule of thumb anyone who posts material online and particularly on social media websites should assume that at some point their identity and the nature of their employment will be revealed. The risk of identification justifying that rule of thumb is obvious and as borne out in this case. They held that where an *APS* employee broadcasts tweets that are harsh or extreme in their criticism of the Government or Opposition or their respective policies, or of individual members of Parliament whatever their political persuasion, and the nature of the author's employment is later discovered, the fact that an employee of the *APS* is then seen to have engaged in conduct of that kind is bound to raise questions about the employee's capacity to work professionally, efficiently and impartially; is likely seriously to disrupt the workplace; and, for those reasons, is calculated to damage the integrity and good reputation of the *APS*.

Where the employee broadcasts tweets commenting on policies and programmes of the employee's Department or which are critical of the Department's administration, damage to the good reputation of the *APS* is apt to occur even if the author's identity and employment are never discovered. It would therefore be facile to suppose that Parliament intended to exclude communications of the kind that the worker broadcast.

Their Honours found a number of difficulties with the worker's arguments, namely:

(1) Section 13 (11) does not purport to proscribe all forms of "anonymous" communications, but only those that fail to "uphold" the *APS* Values and the integrity and good reputation of the *APS* within the meaning of s13(11) of *the PSA.*

(2) As the Solicitor-General of the Commonwealth observed, there are undoubtedly some forms of "anonymous" communication that would so damage the integrity and good reputation of the *APS* that, on any view of the matter, their proscription would be justified. It is in each case a question of fact and degree whether or not a given "anonymous" communication infringes s 13(11) by failing to uphold the *APS* Values and the integrity of the *APS*.

(3) Critically, the worker did not argue before the AAT or the High Court that, apart from the implied freedom, it would not be within the legislative competence of the Commonwealth Parliament to enact legislation in the form of s 13(11) of *the PSA* requiring *APS* employees at all times to behave in a way that upholds the *APS* Values and the integrity and good reputation of the *APS*. She also did not argue that apart from the implied freedom, the sanction of dismissal imposed under s 15 of *the PSA* would not be a unlawful, proportionate response to the nature and gravity of her misconduct. Therefore, she must be taken to have accepted that her conduct in broadcasting the "anonymous" tweets was conduct that failed to uphold the *APS* Values and the integrity and good reputation of the *APS* within the meaning of s 13(11) and that, but for the implied freedom, the sanction of dismissal was warranted.

The question is whether the burden is justified according to the two-part test of whether the impugned law is for a legitimate purpose consistent with the system of representative and responsible government mandated by *the Constitution* and, if so, whether that law is reasonably appropriate and adapted to the achievement of that objective.

Section 3 of *the PSA* proclaims its main objectives, which include establishing *"an apolitical public service that is efficient in serving the Government, the Parliament and the Australian Public",* providing *"a legal framework for the effective and fair employment, management*

and leadership of APS employees", and establishing *"rights and obligations of APS employees".*

The legislative purpose of ss 10(1), 13(11) and 15(1) is to ensure that employees of the *APS* at all times behave in a way that upholds the *APS* Values and the integrity and good reputation of the *APS*. This is a significant purpose consistent with the system of representative and responsible government mandated by *the Constitution*. Section 64 of *the Constitution* provides for the establishment of departments of state and s 67, which provides for the appointment and removal of officers of departments of state other than Ministers, attest to the significance of the *APS* as a constituent part of the system of representative and responsible government mandated by *the Constitution.* They stated:

> 31. …Thus, as was observed in *Federal Commissioner of Taxation v Futuris Corporation Ltd*, apolitical, skilled and efficient service of the national interest has been the ethos of the *APS* throughout the whole period of the public administration of the laws of the Commonwealth.

A law may be regarded as reasonably appropriate and adapted or proportionate to the achievement of a legitimate purpose consistent with the system of representative and responsible government if the law is suitable, necessary and adequate in its balance. A law is suitable if it exhibits a rational connection to its purpose, and a law exhibits such a connection if the means for which it provides are capable of realising that purpose. It is highly desirable, if not essential to the proper functioning of the system of representative and responsible government that the government have confidence in the ability of the *APS* to provide high quality, impartial, professional advice, and that the *APS* will faithfully and professionally implement accepted government policy, irrespective of *APS* employees' individual personal political beliefs and predilections. It is also most desirable, if not essential, that management and staffing decisions within the *APS* be capable of being made on a basis that is independent of the party-political system, free from political bias, and uninfluenced by individual employees' political beliefs.

The requirement imposed on employees of the *APS* by ss 10(1) and 13(11) of the *PSA* at all times to behave in a way that upholds the *APS* Values and the integrity and good reputation of the *APS* represents a rational means of realising those objectives and thus of maintaining and protecting an apolitical and professional public service. Therefore, the impugned provisions are suitable in the necessary sense.

Further, where a law has a significant purpose consistent with the system of representative and responsible government mandated by *the Constitution* and it is suitable for the achievement of that purpose in the sense described, it is not ordinarily to be regarded as lacking in necessity unless there is an obvious and compelling alternative which is equally practicable and available and would result in a significantly lesser burden on the implied freedom.

If a law presents as suitable and necessary in the senses described, it is regarded as adequate in its balance unless the benefit sought to be achieved by the law is manifestly outweighed by its adverse effect on the implied freedom. In the current matter, this directs attention to the quantitative extent of the burden and the importance of the impugned provisions to the preservation and protection of the system of representative and responsible government mandated by *the Constitution.*

The penalties that may be imposed under s15 do not suggest that the impugned provisions are not adequate in their balance. Section 15 provides for a range of penalties and for the selection and imposition of the appropriate penalty by the Agency Head in the exercise of discretion.

As a matter of law, that discretion must be exercised reasonably and, therefore, according to the nature and gravity of the subject contravention. As with other civil penalties, the essence of the task is to put a price on the contravention sufficiently high to deter repetition by the contravenor and others who might be tempted to contravene, but bearing in mind that a penalty of dismissal must not be "harsh, unjust or unreasonable". It is not the case that every employee of the *APS* who commits a breach of s 13(11) by broadcasting public "anonymous" communications is liable to be dismissed. Nor is it the case that the impugned provisions provide for the imposition of a penalty which is not proportionate to the contravention. Breach of the impugned provisions renders an employee of the *APS* liable to no greater penalty than is proportionate to the nature and gravity of the employee's misconduct.

The impugned provisions, including their prescription of the range of penalties and the procedures for the assessment of breach and the imposition of penalty and review, present as a plainly reasoned and focussed response to the need to ensure that the requirement of upholding the *APS* Values and the integrity and good reputation of the *APS* trespasses no further upon the implied freedom than is reasonably justified.

The prohibitions imposed by s 13(11) operating in conjunction with s 10(1), are proportionate to achieving the significant purpose of maintaining and protecting an apolitical public service skilled and efficient in serving the national interest, and the prescription of sanctions in s 15(1) that may be imposed according to law for a contravention of s 13(11) trespasses no further upon the implied freedom than is reasonably justified.

Consequently, provided a decision maker imposing a penalty under s 15 acts reasonably, and so in accordance with the legal requirement that the penalty be proportionate to the nature and gravity of the contravention and the personal circumstances of the employee, there can be no risk of infringement of the implied freedom. If a decision maker imposes a manifestly excessive penalty, it will be unlawful because the decision maker has acted unreasonably, not because of the decision maker's failure to turn his or her mind to, or failure expressly to mention, the implied freedom. The task is to impose a penalty which accords to the nature and gravity of the subject breach and the personal circumstances of the employee in question.

Accordingly, their Honours set aside the AAT's decision, affirmed the appellant's decision dated 1 August 2014 and ordered the worker to pay the appellant's costs.

Gageler J

A summary of his Honour's reasons is as follows:

- The question of constitutional law for determination by the Court is essentially the same as the question considered by the AAT, but there is no occasion to confine the question to the particular circumstances of the termination of the worker's employment.
- Whether ss 10(1)(a), 13(11) and 15(1)(a) and (3) of the *PSA* operate to infringe the implied freedom of political communication to the extent that they purported to authorise the termination of the worker's employment, can and should be addressed by asking whether those provisions operate to infringe the implied freedom of political communication across the range of their potential operations.
- The answer to whether ss 10(1)(a), 13(11) and 15(1)(a) and (3) of the *PSA* operate to infringe the constitutionally implied freedom of political communication across the range of their potential operations turns on whether that burden is justified. The burden is justified if two conditions are satisfied.

- The object of the impugned provisions, identified in s 3(a) of the *PSA*, is consistent with the constitutionally prescribed system of representative and responsible government; and
- The impugned provisions are reasonably appropriate and adapted to achieve that identified object in a manner consistent with that constitutionally prescribed system of government.

- The impugned provisions satisfy both conditions. The object identified in s 3(a) of the *PSA* not only is consistent with the constitutionally prescribed system of representative government but serves positively to promote the constitutionally prescribed system of responsible government. Sections 10(1)(a), 13(11) and 15(1)(a) and (3) are narrowly tailored to achieve that object in a manner which minimally impairs freedom of political communication. The burden which the impugned provisions impose on freedom of political communication is therefore justified.
- Three considerations combine to support the conclusion that ss 10(1)(a), 13(11) and 15(1)(a) and (3) of *the PSA* are reasonably appropriate and adapted to achieve the identified object of establishing an apolitical public service in a manner that involves minimal impairment of freedom of political communication and that is for that reason consistent with the constitutionally prescribed system of representative and responsible government:
  - The requirement of s 13(11) for a person who is an *APS* employee to uphold the *APS* Values is no more than a statutory incident of a relationship of employment. It is applicable only for so long as he or she remains an *APS* employee and non-observance of the requirement can lead only to administrative action, the most extreme outcome of which is that the person ceases to be an *APS* employee by operation of an exercise of discretion under s 15(1)(a), following a finding of breach made in accordance with s 15(3).
  - The content of the particular *APS* Value spelt out in s 10(1)(a) – *t*hat *"the APS is apolitical, performing its functions in an impartial and professional manner"* – is tailor-made to the object in s 3(a). The vagueness in the expression of that *APS* Value and the intrusion of the requirement of s 13(11) to uphold it into the private life of a person who is an *APS* employee are unavoidable in, and no more than commensurate with, achievement of that object. The vagueness and the extent of the intrusion are both ameliorated by the requirement of s 11(1) that the Public Service Commissioner issue directions in writing in relation to each *APS* Value, by the requirement of s 12 that each Secretary promote the *APS* Values, and by the function of *APS* employees within the Senior Executive Service under s 35(2)(c) to promote the *APS* Values by personal example and other appropriate means.
  - The procedural mechanism provided in s 15(1)(a) and (3) for the administrative determination and sanctioning of a breach of the *APS* Code of Conduct is conditioned by requirements for the administrative decision-makers to act reasonably and to observe procedural fairness, capable of being enforced by judicial review, and is subject as well to a comprehensive system of merits review.

- Not only is a finding of breach in accordance with procedures established under s 15(3) subject to review and recommendation by the Merit Protection Commissioner, but termination of employment under s 15(1)(a) can result in an order for compensation or reinstatement if found by the Fair Work Commission to have been

"harsh, unjust or unreasonable", including for reasons that the finding of breach in accordance with s 15(3) was not warranted or that termination under s 15(1)(a) was disproportionate to the gravity of the breach.

Gordon J

A summary of his Honour's reasons is as follows:

- The worker accepted that her conduct failed to uphold the *APS* Values and the integrity and good reputation of the *APS* within the meaning of s 13(11) of the *PSA* and but for the implied freedom of political communication, the termination of her employment under s 15(1)(a) of that Act constituted reasonable administrative action within the meaning of s 5A of the *SRA.*
- Therefore, unless the worker could establish that ss 10(1)(a) and 13(11) of the *PSA* ("the impugned provisions"), read with s 15(1) of that Act, imposed an unjustified burden on the implied freedom of political communication, she had no right to compensation under the *PSA*.
- The impugned provisions, read in the context of *the PSA* as a whole, require members of the *APS*, on pain of sanction, to behave at all times in a way that upholds the values of political neutrality, impartiality and professionalism, while being openly accountable to the government, the Parliament and the Australian public within the framework of ministerial responsibility. That requirement is consistent with and a defining characteristic of the constitutionally prescribed system of representative and responsible government. These values directly promote the internal character and functioning of the *APS* and public confidence in its capacity to serve the government of the day. They do not impose an unjustified burden on the implied freedom of political communication…
- The implied freedom of political communication is a limit on legislative and executive power. The purpose of the impugned provisions (and the action taken against the worker) was to maintain an apolitical public service of integrity and good reputation and the impugned provisions and the associated executive action are directed wholly to maintenance of an apolitical public service, which is a defining characteristic of the constitutionally prescribed system of responsible government.
- The impugned provisions and executive action taken in relation to the worker have no other purpose or effect. Their scope and application are both tailored and limited and they are not self-executing, but provide for both a just and appropriate sanction and transparency as their application requires procedural fairness and is subject to review.
- Attempts to carve out some subset of "anonymous" political interventions or communications create an illusory category, because it focuses on the instant at which the communication is made without regard to the fact that anonymity can and often eventually will be lost. When it is lost, the damage done is that it is then seen that the member of the *APS* was not apolitical, which causes harm to the internal functioning of the *APS* and the public's perception of the *APS* as an apolitical, impartial and professional part of the executive government.
- Consideration of the application of the implied freedom should be approached on a case-by-case basis. In this matter, based on the proper construction and operation of the impugned provisions and the executive action taken under the *PSA*, the only purpose, operation or effect of the impugned provisions is to preserve a defining characteristic of responsible government.

- The connection between those provisions and that executive action and the maintenance of the constitutionally prescribed system of representative and responsible government is immediate and direct. Section 15(1) of the *PSA* and the associated mechanisms for the application of the impugned provisions ensure that the impugned provisions do not operate beyond that purpose. No greater justification is required.

Edelman J

A summary of his Honour's reasons is as follows:

- Despite the deep and broad constraints on freedom of political communication imposed by s 13(11), in the context of the *APS* Values and with the sanctions in s 15(1) of the *PSA*, the law is reasonably necessary and adequately balanced given the place of its legitimate policy purpose in Australia's constitutional tradition and the importance of that purpose to responsible government. The legislation is valid in all of its applications.
- The questions before the Court reduce to whether those provisions (as at 15 October 2012) are consistent with the implied freedom of political communication and, if not, then whether the exercise of discretion under those provisions must occur consistently with the implied freedom of political communication.
- These questions are not concerned with whether ss 13(11) and 15, properly interpreted and applied, would lead to the conclusion that the decision to terminate the worker's employment was not *"reasonable administrative action taken in a reasonable manner"*. Although the worker's primary submission in this Court effectively sought to agitate such a ground, by arguing that s 13(11) does not apply to anonymous communications, this Court declined to entertain that submission.
- Given this history and context, s 13(11), when read with s 10(1)(a) and the other *APS* Values, does not impose behavioural obligations that preclude a public servant from making political comment on social media. Rather, they support an interpretation of s 13(11) that creates a boundary, albeit ill-defined, between acceptable expression of political opinions and unacceptable expression of political opinions.
- Taking into account that a public servant is intended to be able to take part in their political community, that boundary will only be crossed when comments sufficiently imperil the trust between, on the one hand, the *APS* and, on the other, Parliament, the executive government, or the public. An assessment of when that trust will be sufficiently imperilled will depend upon all the circumstances.
- Although all circumstances are relevant, there are six factors of particular significance to any assessment of whether the relevant trust is sufficiently imperilled: (i) the seniority of the public servant within the *APS*; (ii) whether the comment concerns matters for which the person has direct duties or responsibilities, and how the comment might impact upon those duties or responsibilities; (iii) the location of the content of the communication upon a spectrum that ranges from vitriolic criticism to objective and informative policy discussion; (iv) whether the public servant intended, or could reasonably have foreseen, that the communication would be disseminated broadly; (v) whether the public servant intended, or could reasonably have foreseen, that the communication would be associated with the *APS*; and (vi) if so, what the public servant expected, or could reasonably have expected, an ordinary member of the public to conclude about the effect of the comment upon the public servant's duties or responsibilities.

- In some cases, all six factors could point strongly towards a breach of s 13(11) by behaviour that imperils the trust protected by that sub-section, despite the communication being anonymous. However, anonymity is only one factor to be considered in the context of the *APS* Value in s 10(1)(a). The substance of the comment might be such as to imperil the relationships of trust even if there is only a remote possibility of it being generally attributed to the public servant or the public service. A comment might also require assessment of other *APS* Values such as the sensitivity of the *APS "to the diversity of the Australian public".*
- If the operation of a law purports to further its legitimate purpose by means that are more extreme than would rationally be expected, this does not break the rational connection between the means adopted by the law and its purpose, although it might support a submission at the next stage that the burden imposed was not reasonably necessary.
- The next question is whether there were alternative, reasonably practicable, means that would achieve the same object to the same extent but with a less restrictive effect on freedom of political communication. This requires consideration of whether another law presented an alternative that could reasonably have been expected, in an "obvious and compelling sense, to have (i) imposed a significantly lesser burden upon freedom of political communication, and (ii) achieved Parliament's purpose to the same or a similar extent. The extent of the burden upon freedom of political communication can be assessed by reference to the "depth" and "width" of the burden.
- The relevant object of the *PSA* in s 3(a), to establish an apolitical public service that is efficient and effective in serving the Government, the Parliament and the Australian public, is an object of great importance. It is part of the constitutional conception of responsible government. The law is not inadequate in its balance.

Administrative Appeals Tribunal Decisions

A psychiatric assistance dog is nether "medical treatment" nor "an aid" as defined in the Safety, Rehabilitation and Compensation Act 1988

Brideson by guardian Lynette Brideson and Australian Capital Territory (Compensation) [2019] AATA 2314 – Deputy President Humphries – 31 July 2019

Summary

The AAT disallowed a claim for the costs of maintaining a psychiatric assistance dog under the SRC Act. This decision contrasts with the approach taken by the WCC in Parsons v Corrective Services NSW [2018] NSWWCC 227 (Bulletin no. 24), which held that the provision of an assistance dog and the costs of maintaining it are reasonably necessary for the purposes of s 60 WCA.

Background

In September 2011, the worker suffered work-related PTSD and Bruxism. Comcare accepted liability under s 14 of the *Safety, Rehabilitation and Compensation Act 1988 (the SRC Act)*. In 2014 he acquired a dog as a family pet, but on 3 February 2016, he applied to have it trained as a Psychiatric Service Dog. After it was trained as a *mind dog*, he was able to go to public places with it that he had previously avoided (because he suffered additional stress or panic attacks). On 30 July 2016, he claimed the costs of insurance

premiums, animal registration, dog training, dietary food, grooming, veterinary costs, de-sexing and vaccination, on the basis that it was a psychiatric assistance dog (or mind dog).

Comcare rejected the claim because these costs did not satisfy the criteria in s 16 (1) of *the SRC Act.* It asserted that the dog: (1) was not *medical treatment* as defined in s 4; (2) was not obtained in relation to the accepted medical condition; and (3) if it was considered medical treatment, it was not reasonable medical treatment in the circumstances. It asserted that a psychiatric assistance dog could fall within ss 16 and 29 of *the SRC Act.*

The applicant sought reconsideration of that decision and asserted that the costs are compensable under either ss 16 or 39 of *the SRC Act,* but Comcare affirmed its decision and asserted that an *aid* must be something that is artificial in nature and not a dog or other animal. The applicant then sought a merits review by the AAT.

Relevant legislation

Section 16 of *the SRC Act* provides:

> (1) Where an employee suffers an injury, Comcare is liable to pay, in respect of the cost of medical treatment obtained in relation to the injury (being treatment that it was reasonable for the employee to obtain in the circumstances), compensation of such amount as Comcare determines is appropriate to that medical treatment.

Section 4(b) of *the SRC Act* defines *medical treatment,* relevantly, as *"therapeutic treatment obtained at the direction of a legally qualified medical practitioner…"*

Section 39 of *the SRC Act* provides that the cost of an *aid or appliance,* reasonably required by the worker, can be recovered, relevantly, as follows:

> (1) Where:
>
> (a) an employee suffers an injury resulting in an impairment; and
>
> (b) the employee is undertaking, or has completed, a rehabilitation program or has been assessed as not capable of undertaking such a program;
>
> the relevant authority is liable to pay compensation of such amount as is reasonable in respect of the costs, payable by the employee, of:
>
> … (e) any aids or appliances for the use of the employee, or the repair or replacement of such aids or appliances;
>
> being … or aids or appliances reasonably required by the employee, having regard to the nature of the employee's impairment and, where appropriate, the requirements of the rehabilitation program…

Deputy President Humphries identified the issues as follows:

(1) In relation to s 16: (a) whether the dog is *medical treatment* as defined in s 4 (1); (b) whether the dog was obtained *in relation to* the worker's accepted injuries; and (c) whether it was *reasonable* for the worker to obtain the dog in the circumstances; and

(2) In relation to s 39: (a) is the dog an aid or an appliance; and (b) was the dog reasonably required by the worker having regard to the nature of the impairment arising from his injury or injuries.

Humphries DP held that the dog is not a form of medical treatment under s 16 and he noted several difficulties with the worker's claim, including that the dog was not obtained at the direction of a medical practitioner. The definition appears to contemplate that obtaining the

treatment follows from the giving of the direction for that treatment to occur and it does not fall within the definition of *medical treatment*.

However, even if the dog was obtained at the direction of a medical practitioner, s 16 requires *medical treatment* to be reasonable for the employee to obtain in the circumstances and he doubted that a psychiatric assistance dog could ever satisfy that provision. He stated:

> 42. For treatment to be reasonable…to obtain, it must plainly be efficacious to some extent. As already noted, to be therapeutic treatment need not be curative; it may merely relieve the symptoms or effects of the condition. But inherent in the requirement that medical treatment be reasonable to obtain is the notion that the treatment actually achieves a therapeutic benefit, however defined. Treatment which purports to be procured in relation to a condition but which does not actually cure or relieve that condition cannot, in my view, be reasonably obtained as required by s 16 (1). As much may be taken from Finn J's observation in *Comcare v Watson* (at 277) that treatment of an injury must be appropriately adapted to its purpose or is effective in some degree in realising that purpose. The concept of treatment being effective is a requirement applied in many decisions of the Tribunal: see for example *Alamos and Comcare* [2014] AATA 629 at [24]; *Pethes and Comcare* [2018] AATA 483 at [49]-[50]; *Durham and Comcare* [2014] AATA 753 at [59] - [62]. …

Humphries DP held that the dog was at best an adjunct to *medical treatment.* While he accepted that it had conferred some practical benefits in the management of the worker's PTSD, it was not clear that these were conferred as *medical treatment* rather than as general benefits relating to well-being that accrues to many dog owners. He stated:

> 46. …The Tribunal takes official notice of the fact that many people derive comfort and fulfilment from their relationship with animals, dogs in particular. Such relationships can be of particular benefit to a person during periods of distress. Given the uncertain state of the clinical research on the therapeutic value of assistance dogs, real doubt must be entertained about whether the benefits to Mr Brideson from Ted rise any higher than those he would obtain from a dog which had not been designated or prepared as an assistance dog…
>
> 48. The test to be applied here is not simply how Mr Brideson perceives the benefits derived from Ted. As Gray J said in *Jorgensen and Commonwealth* (1990) 23 ALD 321:
>
> > In my view, the question of reasonableness in the circumstances is intended to raise issues as to whether some kind of medical treatment other than that undertaken, or in some cases no medical treatment at all, would have been better for a person suffering from the particular injury. The idea of reasonableness involves objectivity. A reference to the circumstances raises subjective factors, but they are intended to be subjective factors related to the nature of the injury, and not to details of the personal life of an applicant for compensation. …
> >
> > 56. It would be unwise for the Tribunal to opine that a psychiatric assistance dog could never constitute medical treatment, but on the state of the evidence before it in the present proceedings the proposition is very doubtful. Of course, to find for an applicant, the Tribunal must draw some satisfaction from the sum of the evidence before it that an applicant's claim meets the test of eligibility set out in the relevant legislation (see *Beezley v Repatriation Commission* [2015] FCAFC 165 at [68]); in the circumstances of this application, it is difficult to reach that level of satisfaction.

Humphries DP noted that the worker conceded that the dog could not be *an appliance.* He held that it cannot be *an aid* and stated, relevantly:

> 64. …The inclusion of an assistance dog in the category aids or appliances would not seem to be consistent with either the common understanding of those terms or with the intention of Parliament, as discerned from the minister's second reading speech and the Explanatory Memorandum.
>
> 65. The object of s 39 and the nature of its relationship with the evidence outlined above strongly guard against a conclusion that animals fall within the ambit of the provision. The object of s 39 is to provide for compensation to be payable in respect of an injury for alterations, modifications or aids or appliances. As stated above, s 39 only makes express provision for inanimate objects. In order to accept the construction which Mr Brideson advances as finding that animals can be an aid, it would need to be shown on the balance of probabilities that a psychiatric assistance dog is a means or source of help or assistance. The Tribunal outlined above how an uncertain and vague evidential basis has been put forward in this case to determine the extent to which dogs may aid people with psychiatric conditions such as PTSD. Given this, it is difficult to see how Parliament could have intended animals to fall within the ambit of s 39.

Humphries DP held that even if the dog was *an aid*, the *SRC Act* does not make provision for the costs of its care and upkeep and those costs would not be recoverable because the dog was *not reasonably required* by the worker. Accordingly, he affirmed Comcare's decision.

WCC Presidential Decisions

Fresh or additional evidence under s 352 (6) WIMA – Factual error & application of Raulston v Toll Pty Ltd

Sutherland v D E Maintenance Pty Ltd [2019] NSWWCCPD 39 – Deputy President Snell – 26 July 2019

On 21 September 2017, the appellant injured his neck and lower back at work. He claimed compensation and the insurer accepted the claim. However, in June 2018, Dr Darwish recommended surgery at the L5/S1 level and the insurer disputed that this was reasonably necessary. The appellant later saw Dr Day, who also recommended surgery but opined that disc replacement was preferable to a fusion. On 30 November 2018, the appellant commenced WCC proceedings seeking orders under s 60 *WCA* with respect to the procedure recommended by Dr Day.

Arbitrator Wynyard accepted the opinion of Dr P Bentivoglio (qualified by the insurer), that *"I do not believe that he will make great benefit from having an anterior interbody fusion with a minor disc injury that he has at the L5/S1 level, especially as he has no evidence of neurological dysfunction."* He entered an award for the respondent.

On appeal, the appellant asserted that the Arbitrator erred: (1) in reaching conclusions that were contrary to the weight of the evidence; (2) by not giving weight to evidence of neurological problems other than radiological evidence; (3) by not applying the principles of expert evidence to the evidence of Dr Bentivoglio; (4) by giving a decision that was illogical in that he accepted that all conservative treatments had failed but declined to find that surgery was reasonable; and (5) in finding that Dr Gehr did not read the documents briefed to him in circumstances where there was no evidence to permit such a finding.

The appellant sought to rely upon fresh evidence on the appeal, namely: a statement from the appellant's solicitor dated 18 March 2019, which simply identifies a report from Dr Day dated 11 February 2019; and (2) that report from Dr Day, in which he stated that upon review the appellant told him that at the arbitration hearing it was said that there was no evidence of nerve compression on his MRI scans. The doctor also opined that internal disruption of the L5/S1 disc had set up a chronic pain pattern and that total disc replacement would provide the appellant with the best potential for a more-functional outcome and long-term functional capacity improvement.

Section 352 (6) *WIMA* provides to the effect that leave is required to rely upon fresh evidence and that the Commission is not to grant leave unless satisfied that the evidence was not available to the party and could not reasonably have been obtained by them before the proceedings concerned, or that failure to grant leave would cause a substantial injustice in the case.

Deputy President Snell refused to admit fresh evidence on the appeal. In doing so, he cited the decisions of Sackville AJA in *Heggie* and *CHEP Australia Ltd v Strickland*, in which the Court of Appeal considered the operation of s 352 (6) *WIMA,* and the decision of Roche DP in *Drca v KAB Seating Systems Pty Ltd*:

> The legal profession is reminded, yet again, that it will only be in the most exceptional case where a party will be permitted to tender on appeal evidence that, with reasonable diligence, was readily available at the arbitration. Arbitrations are not a dress rehearsal where the parties can await the outcome and then attempt to tender, on appeal, evidence that could and should have been tendered at the arbitration, as if the arbitration was merely a preliminary hearing. (emphasis in original)

He held that the further medical report could have been obtained before the arbitration hearing and that the second limb of the test in *Strickland* was not satisfied.

Snell DP upheld ground (1) of the appeal. In doing so, he opined that the opinion of Dr Darwish *"constituted little more than a bare ipse dixit, to employ the language of her Honour in Edmonds"*. His reports did not refer to the underlying facts on which the opinion was based, particularly clinical signs and investigations, nor did they adequately expose the doctor's reasoning process that led to his conclusions. They were inadequate to establish that the proposed surgery was reasonably necessary and they were entitled to little weight in the circumstances. Therefore, the Arbitrator rightly did not find them persuasive.

Snell DP held that the way in which the Arbitrator dealt with Associate Professor Sheridan's evidence involved appealable error, of the sort identified in *Raulston*, applying *Whiteley Muir & Zwanenberg.* He overlooked the doctor's interpretation of the MRI scan, which he must have viewed when he examined the appellant, and failed to give appropriate weight to the doctor's opinion due to a perceived failure to offer an "explanation", which was not in the circumstances required. He therefore allowed the appeal and remitted the matter to another Arbitrator for re-determination.

Adequacy of reasons – COD revoked & matter remitted to another Arbitrator for redetermination of all issues

Golden Swan Investments (Australia) Pty Ltd v Yahiaoui [2019] NSWWCCPD 40 – Deputy President Wood – 29 July 2019

The worker alleged that he suffered a psychological injury as a result of bullying and harassment by his manager from 7 November 2015 to 24 June 2016. He claimed compensation, but the insurer disputed the claim under ss 4, 9A, 11A and 33 *WCA.* On 30

August 2018, he filed an ARD claiming continuing weekly payments, s 60 expenses and compensation under s 66 *WCA* for 22% WPI.

Arbitrator Burge conducted an arbitration hearing on 13 November 2018. On 31 January 2019, he issued a COD, which found in favour of the worker in respect to the disputes under ss 4, 9A and 11A *WCA.* He awarded the worker weekly payments for 2 closed periods, from 8 August 2016 to 7 November 2016 and from 2 February 2017 to 29 March 2018.

On appeal, the appellant asserted that: (1) the Arbitrator failed to give adequate reasons for his finding regarding injury; (2) the Arbitrator erred in accepting the worker's medical evidence, as those opinions were not supported by the preponderance of the evidence; and (3) The Arbitrator erred in finding that the worker had discharged his onus of establishing incapacity for the periods for which he warded weekly payments.

Deputy President Wood noted that a significant part of the appellant's case was that the worker was not a witness of truth. Relying upon the principles laid down in *Makita (Australia) Pty Ltd v Sprowles*, it also challenged the probative value of the reports provided by Dr Teoh, because they recorded an inaccurate history, the "diagnosis" was simply a description of symptoms, and he failed to address the contrary histories contained in documents that were provided to him.

Wood DP upheld ground (1). She referred to a "useful summary" of principles regarding the adequacy of reasons that was provided by McColl JA (Ipp JA & Bryson AJA agreeing) in *Pollard v RRR Corporation Pty Ltd,* namely:

> The Court is conscious of not picking over an ex tempore judgment and, too, of giving due allowance for the pressures under which judges of the District Court are placed by the volume of cases coming before them. However a trial judge's reasons must, 'as a minimum ... be adequate for the exercise of a facility of appeal'. A superior court, 'considering the decision of an inferior tribunal, should not be left to speculate from collateral observations as to the basis of a particular finding'.
>
> The giving of adequate reasons lies at the heart of the judicial process. Failure to provide sufficient reasons promotes 'a sense of grievance' and denies 'both the fact and the appearance of justice having been done', thus working a miscarriage of justice.
>
> The extent and content of reasons will depend upon the particular case under consideration and the matters in issue. While a judge is not obliged to spell out every detail of the process of reasoning to a finding, it is essential to expose the reasons for resolving a point critical to the contest between the parties.
>
> The reasons must do justice to the issues posed by the parties' cases. Discharge of this obligation is necessary to enable the parties to identify the basis of the judge's decision and the extent to which their arguments had been understood and accepted ... it is necessary that the primary judge 'enter into' the issues canvassed and explain why one case is preferred over another'.

Wood DP also referred to the observation made by Kirby J in the High Court's decision in *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq),* that where there is evidence in support of a party's case, that evidence must be considered in the reasoning process in a satisfactory way. Further, in *Goodrich Aeropspace Pty Ltd v Arsic,* Ipp JA (Mason P agreeing) stated*:*

> It is not appropriate for a trial judge merely to set out the evidence adduced by one side, then the evidence adduced by another, and then assert that having seen and

> heard the witnesses he or she prefers or believes the evidence of the one and not the other. If that were to be the law, many cases could be resolved at the end of the evidence simply by the judge saying: 'I believe Mr X but not Mr Y and judgment follows accordingly'. That is not the way in which our legal system operates.

Wood DP held that where there are credit issues to be dealt with, it is necessary to explain why one party's evidence is to be accepted over the other. However, the Arbitrator's reasons do not disclose the steps he took to arrive at his decision that the worker was injured as alleged and that the worker's employment was a substantial contributing factor and he gave explanation about why he accepted that the worker's evidence was sufficient to establish workplace bullying and harassment. He failed to engage with the substantial evidence relied upon by the appellant. She also held:

> 157. I might also add that the Arbitrator's acceptance that the respondent had a "real perception ... of a hostile work environment," such that the respondent was injured, is not the legal test referred to in *Attorney General v K*. The test is, as described by Basten JA in *State Transit Authority of New South Wales v Fritzi Chemler*, whether the worker perceived the workplace as creating an offensive or hostile working environment.

Accordingly, Wood DP held that the process of fact finding was miscarried. She revoked the COD and remitted the matter to another Arbitrator for redetermination of all issues.

FROM THE WIRO

If you wish to discuss any scheme issues or operational concerns of the WIRO office, I invite you to contact my office in the first instance.

Kim Garling